

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

DANIEL WALKER, individually )  
and on behalf of all others )  
similarly situated, )  
 )  
Plaintiff, ) No. 3:17-cv-01791-YY  
 )  
v. ) February 27, 2018  
 )  
FRED MEYER, INC., a Delaware ) Portland, Oregon  
corporation, )  
 )  
Defendant. )

TRANSCRIPT OF PROCEEDINGS

(Telephonic Oral Argument)

BEFORE THE HONORABLE YOULEE YIM YOU  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

Court Reporter: Ryan White, RMR, CRR, CSR/CCR  
United States District Courthouse  
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1 (February 27, 2018; 9:32 a.m.)

2  
3 P R O C E E D I N G S  
4

5 THE COURT: Good morning. This is Judge You. We're  
6 on the record. This is case No. 17-cv-1791. The name of the  
7 case is Walker v. Fred Meyer.

8 Counsel, please state your appearances for the record  
9 starting with plaintiff's counsel.

10 MR. WOODROW: Good morning, Judge. Steven Woodrow for  
11 the plaintiff.

12 MR. WEINGART: And good morning, Your Honor. This is  
13 Neal Weingart, also for the plaintiff.

14 THE COURT: All right. How about counsel for the  
15 defense?

16 MS. WHITTAKER: Good morning, Your Honor. This is  
17 Faith Whittaker for the defendant.

18 MR. MATTINGLY: Your Honor, this is Mike Mattingly,  
19 also for the defendant.

20 MR. RICHMAN: Good morning, Your Honor. This is  
21 Taylor Richman, global counsel for the defendant.

22 THE COURT: Okay. Good morning again.

23 Let me remind you that we are on the record. We have  
24 a court reporter who is also on the line, so just remember that  
25 she is always present and making her very best attempt to

1 provide an accurate transcript of the proceedings. So please  
2 speak slowly and clearly, and if you can, try to remember to  
3 identify yourself before speaking.

4 We are here on the defendant's motion to dismiss for  
5 failure to state a claim and also for lack of jurisdiction. I  
6 have the motion. I received the motion as well as the exhibits,  
7 also the response in addition to other exhibits and the reply.

8 Let's start with the question with respect to the  
9 standalone disclosures.

10 And what I'm going to do is, of course, preface my  
11 questions with the statement that you all know this case far  
12 better than I do, and what I'm hoping is that you can help to  
13 explain some things and fill in some gaps for me.

14 Now, the complaint in this case, as you know, says  
15 that this was an online application. And I'm just pulling up  
16 the complaint here because I want to refer to a section of it.

17 I'm referring to paragraph 13 which says that  
18 Mr. Walker applied for a job with Fred Meyer using Fred Meyer's  
19 online application process. And then No. 15 says, "Upon  
20 beginning employment, plaintiff was required to complete various  
21 acknowledgements of company disclosures including a series of  
22 disclosures regarding his background and criminal history."

23 And then paragraph 17 refers to some other  
24 documents -- actually, let's move to paragraph 18.

25 And so I guess what's unclear to me, and perhaps

1 you've explained it in your pleadings and I've just missed it,  
2 but can I ask, the disclosure at issue, which is Exhibit C, when  
3 was that provided to Mr. Walker and in what context?

4 I guess -- and because this is a motion to dismiss  
5 based on the complaint, where can I ascertain that information  
6 in the complaint?

7 Let me start with plaintiff's counsel.

8 MR. WOODROW: Yes, Judge.

9 While we need discovery to clear up some of these  
10 factual issues, it's plaintiff's understanding that there was an  
11 online application process. Then Mr. Walker had to --

12 THE CLERK: Excuse me, Your Honor. Your Honor?

13 THE COURT: Yes.

14 THE CLERK: The court reporter needs to know who is  
15 speaking, please.

16 MR. WOODROW: My apologies. It's Steven Woodrow,  
17 Your Honor, for the plaintiff.

18 THE CLERK: Thank you.

19 MR. WOODROW: It's our understanding, Judge, and we  
20 would need confirmatory discovery on it, that Mr. Walker applied  
21 using the online application process, was then called in to Fred  
22 Meyer where he in person was presented with documents, and that  
23 these disclosures referenced in these paragraphs are those  
24 disclosures that were provided in -- not in the online  
25 application but in that in-person session or sessions.

1 THE COURT: And I think that what you're saying  
2 arguably could be inferred from the facts as they're alleged in  
3 the complaint, but I just wanted to clarify. I just wanted to  
4 make an attempt to clarify that.

5 Additionally, the disclosure appears to have been  
6 signed -- there actually appears to be a physical signature  
7 rather than a digital signature. Again, referring to Exhibit C.

8 But -- so I just wanted to clarify because I did see  
9 one case -- I can't remember which case it was, but in doing  
10 some research on this I saw one case in which I think that there  
11 were online disclosures and there was a question as to whether  
12 or not the -- whether or not they were separate documents or all  
13 the same.

14 Nevertheless, anything that the defense would like to  
15 say in that regard?

16 MR. MATTINGLY: Your Honor, this is Mike Mattingly.

17 We would agree that the Exhibit C to our motion, which  
18 was executed by Mr. Walker on 3/21/17, was executed at the store  
19 during his in-person interview, and that date coincides with  
20 the -- his interview at the store.

21 THE COURT: Okay. Great. Thanks so much for the  
22 clarification.

23 All right. So then moving to the substance of the  
24 issues, I would like plaintiff to explain, looking at Exhibit C,  
25 is it your argument that the last three paragraphs of that

1 document, that that is where, for lack of a better way to put  
2 it, the line is crossed in terms of the requirements of  
3 1681b(B) (2) (A) (i)?

4 MR. WOODROW: Yes, Judge.

5 I think we take a more wholistic approach than just  
6 limiting it to the last three paragraphs. I think when it's  
7 read with the acknowledgment of receipt and the authorization  
8 that followed it, it's pretty clear that the disclosure is  
9 riddled with extraneous information. It combines investigative  
10 consumer reports with ordinary consumer reports. It distracts  
11 from the consumer report disclosures. It contains information  
12 about interviews and bringing folks to accompany you when you go  
13 view information and other extraneous info.

14 It doesn't contain the one thing that the statute  
15 authorizes, and that's an authorization which says I allow for  
16 the obtaining of a consumer report. And what the defendant does  
17 here is they provide a separate authorization page, but that's  
18 riddled with extraneous information too.

19 And so when you read these two documents together,  
20 Your Honor, it's pretty clear that they don't stand alone. We  
21 would allege that if the purpose of the standalone disclosure  
22 requirement and the allowance for an authorization in one  
23 document so the applicants know what they're authorizing,  
24 separate -- separating them but loading up the authorization  
25 with extra information when the disclosure itself combines

1 investigative consumer report information with ordinary  
2 information, it defeats the purpose of the statute, and we  
3 allege specifically in paragraph 20 that Mr. Walker was confused  
4 and that ordinary consumers would be similarly confused.

5 And it's not clear whether the person is authorizing  
6 an investigative consumer report, a consumer report, they're  
7 just acknowledging receipt of this document, or what. That's  
8 the problem.

9 THE COURT: Let me ask you this. So in looking at  
10 subsection (2) (A), in subsection (i) it says that this  
11 standalone document has to be provided, and then it separately  
12 says in subsection (2) that the consumer has to authorize in  
13 writing.

14 Is there anything in this statute that requires the  
15 disclosure and the authorization -- or is there any other  
16 authority that requires the disclosure and the authorization to  
17 be in the same document?

18 MR. WOODROW: No, Judge. The disclosure and the  
19 authorization do not have to be in the same document.

20 What the authorities say, and what they instruct, is  
21 that the only thing that the standalone disclosure can contain,  
22 and without extra -- the only extra information it can contain  
23 without it losing its standalone disclosure status is the  
24 authorization because the authorization is simply supposed to  
25 authorize the obtaining of a consumer report. It's not supposed



1 to give carte blanche authority to a consumer reporting agency  
2 blessing whatever methods that consumer reporting agency has  
3 decided to use to gather the information.

4 And that's the problem with the authorization here.  
5 To read this authorization as a proper one simply because it's  
6 in writing when it is loaded up with allowing GIS to, you know,  
7 gather information from any public or private information  
8 source, when you have that, it defeats the intent of the statute  
9 which is to let people know clearly and conspicuously that they  
10 are authorizing the obtaining of a consumer report, nothing  
11 else.

12 THE COURT: Let me ask you this. Let me ask you this.

13 So subsection (2), the authorization, there's no  
14 requirement that the authorization be in a standalone setting;  
15 correct?

16 MR. WOODROW: Correct. It can be included with the  
17 disclosure.

18 THE COURT: Well, let me ask you this. So  
19 hypothetically if I concluded that there were portions of the  
20 disclosure, Exhibit C, that were -- that did not comply with  
21 subsection (i), so for example if I looked at Exhibit C and  
22 there -- these last two paragraphs, if I found that, including  
23 those last two paragraphs, didn't comply with subsection  
24 (i) -- are you following me so far?

25 MR. WOODROW: Yes.

1 THE COURT: -- then what does it matter what is  
2 contained in -- what does it matter what additional information  
3 is contained in Exhibit D --

4 MR. WOODROW: Technically, Your Honor --

5 THE COURT: -- other than the authorization?

6 MR. WOODROW: Yes, Judge. I understand the question,  
7 the Court's question.

8 And in that case it wouldn't -- it wouldn't change the  
9 fact that there's a violation; it just simply compounds to the  
10 confusion. And that's what those allegations add. It adds  
11 color to the complaint that not only does the quote/unquote  
12 standalone disclosure not stand alone, but the authorization is  
13 also confusing, and that when you look at these documents that  
14 the -- that these applicants and employees are being provided,  
15 it does not comport with the statute's requirement that they be  
16 clearly and conspicuously notified that they are going to have a  
17 consumer report obtained about them.

18 If the Court were to find that the bottom half of  
19 Exhibit C is plausible -- counts it as a plausible violation of  
20 the FCRA, then that's what this case is going to be about.

21 THE COURT: The reason I'm asking is because  
22 subsection (2) does not contain that clear and conspicuous  
23 language or any standalone language, and here we have an  
24 authorization in Exhibit D -- and I understand what you're -- I  
25 understand your argument that it's altogether confusing, but I'm

1 parsing it down more specifically than that.

2 So in any event, let me ask you another question.

3 So we've talked about the last two paragraphs, or I  
4 mentioned the last two paragraphs. I want you to look at the  
5 third paragraph and explain to me why the third paragraph is  
6 really any different than the last sentence of the first  
7 paragraph.

8 MR. WOODROW: You're talking about the paragraph "To  
9 prepare the reports GIS may investigate"?

10 THE COURT: Yes. And so in looking at that, it seems  
11 to me that that paragraph essentially reiterates what was  
12 perhaps more generally stated in the last sentence of the first  
13 paragraph. So what's the harm in adding the third paragraph?

14 MR. WOODROW: Certainly, Judge.

15 The information contained in the third paragraph  
16 actually expands upon the scope of the first paragraph. The  
17 third paragraph references information that some of it can be  
18 included in a consumer report, but some of it's also stuff that  
19 you can get in investigative consumer reports like, you know,  
20 references, et cetera.

21 And so it's confusing to the consumer whether this  
22 paragraph is supposed to be a mundane disclosure that's allowed  
23 and permitted with respect to ordinary consumer reports, or is  
24 it actually touching upon the nature and scope of the  
25 investigation to be performed as part of an investigative

1 consumer report.

2 THE COURT: I understand.

3 MR. WOODROW: That's why -- I'm sorry, Judge. But  
4 this is why the statute requires separate disclosures.

5 THE COURT: Okay. I understand. Thank you.

6 All right. So let me ask the defense if you would  
7 like to comment or respond to anything that plaintiff's counsel  
8 has said with respect to the questions that I've asked.

9 MR. MATTINGLY: Absolutely, Your Honor. This is Mike  
10 Mattingly.

11 Your Honor, first and foremost, with respect to  
12 the -- and we addressed this in our reply -- the complaint  
13 doesn't contain an allegation, a violation of  
14 1681b(B) (2) (A) (ii). That simply is not a cause of action. So I  
15 don't know why we're addressing it specifically.

16 But to the extent that it is considered to be part of  
17 another claim, we would agree that there is no requirement in  
18 the statute which requires the authorization to be a standalone  
19 clear and conspicuous document. So regardless of what  
20 information is in there, one, there's no claim; and, two, it's  
21 irrelevant.

22 With respect to the combination of consumer report  
23 information or disclosures under 1681b(B) (2) (A) (i) and a  
24 combination of investigative consumer report information as  
25 authorized by 1681g, there is no problem with the combination.

1 In fact -- and the FTC opinion letter, *Willner*, that is cited in  
2 the opposition by the plaintiff, specifically states that those  
3 disclosures can be combined so long as the investigative  
4 consumer report disclosure does not overshadow.

5 And so that's based on -- now we would have a further  
6 discussion about the persuasiveness of *Willner* in light of the  
7 *Syed* ruling in 2017.

8 But there's absolutely no problem with a limited  
9 disclosure such as we have here in Exhibit C which tells the  
10 consumer the basic parameters within which it either may obtain  
11 a consumer report or investigative consumer report. There's  
12 nothing inappropriate in that. Under statute, those are  
13 authorized. And there's no extraneous information, as a matter  
14 of law.

15 THE COURT: Okay. All right. So then let me ask just  
16 generally if there's anything that you would like to argue with  
17 respect to the standalone disclosure issue.

18 And I'll start with the defendant because it's your  
19 motion. Anything else that you would like to highlight?

20 And don't feel that you need to rehash all of the  
21 arguments that you've made in your briefing, but I just wanted  
22 to give you the opportunity, if you wanted, to highlight  
23 anything with respect to this particular claim.

24 MR. MATTINGLY: Yes, Your Honor. And this is Mike  
25 Mattingly again. And I'll keep it brief because I think our

1 written positions outline standards -- the appropriate  
2 standards.

3           So I just would like to say that, Your Honor, we  
4 believe the form speaks for itself on its face. The -- it only  
5 includes -- the information that it included is -- as a matter  
6 of law, is not extraneous. It only references process for  
7 obtaining consumer reports or potentially investigative consumer  
8 reports as authorized by the law. It does not include any sort  
9 of the extraneous information that other district courts have  
10 found to be impermissible such as the cases cited in the  
11 opposition by the plaintiff that included extraneous state law  
12 notices, statements of internal policy, EEO preferences, or even  
13 liability waivers.

14           So none of that stuff is included here, Your Honor.  
15 And rather, we would just point out that each and every  
16 statement either informs the consumer, or in this case,  
17 Mr. Walker, about Fred Meyer's FCRA process, the information  
18 that would be obtained, describes the permissible purpose under  
19 the statute for which we obtain the report, and most  
20 importantly, some of his legal rights. So with respect to that,  
21 we would say the form speaks for itself.

22           The only other thing I would say, Your Honor, is with  
23 respect to -- Mr. Walker has made the strategic decision to seek  
24 statutory damages on behalf of a national class rather than  
25 actual damages. So with that comes a heightened burden that he

1 has to prove willfulness using a recklessness standard and which  
2 is a higher standard, obviously, than negligence.

3 And the only other thing I would point out is that the  
4 *Syed* case recently, the Ninth Circuit relying on the Supreme  
5 Court has said that where an employer adopts a reading of the  
6 statute runs a risk of error substantially greater than the risk  
7 associated with a reading that was merely careless, that is  
8 where a willful violation could occur.

9 The *Syed* court also acknowledged that it's possible to  
10 imagine interpretations of 1681b(B) (2) (A) that would be  
11 objectively unreasonable without rising to the level of  
12 recklessness.

13 Clearly, Your Honor, it's Fred Meyer's position that  
14 nothing in this disclosure is unreasonable. But even if this  
15 Court determines that anything was extraneous information and  
16 was objectively unreasonable based on existing case law or the  
17 statute, it clearly does not rise to the level of recklessness  
18 given that each and every statement just seeks to inform the  
19 consumer of their rights under the FCRA and describe the process  
20 that would be undertaken so that they could sign a separate  
21 acknowledgment that was knowing and voluntary.

22 So with that, Your Honor, that's what we take off  
23 that.

24 THE COURT: All right. Thank you.

25 And so let me move back, then, to Mr. Woodrow.

1 Anything that you would like to highlight or respond  
2 to?

3 MR. WOODROW: Yes. Thank you, Judge. Steven Woodrow  
4 very quickly.

5 Judge, Fred Meyer takes the allegations of the  
6 complaint in the light most favorable to themselves. We  
7 expressly allege that the consumer report combined with the  
8 investigative consumer report was confusing to the plaintiff and  
9 to others. Whether that can be true turns into a fact issue and  
10 this Court should decline the invitation to decide as a matter  
11 of law that all the extraneous information in this disclosure  
12 isn't quote/unquote extraneous enough as a matter of law to  
13 defeat the standalone disclosure requirement.

14 Similarly, Judge, willfulness is a fact issue.  
15 Federal Rule 9 allows plaintiffs to plead knowledge generally  
16 and intent generally. I think Fred Meyer is asking for a  
17 pleading burden that the federal rules simply don't require in  
18 this situation.

19 The finder of fact will decide based on the evidence  
20 of record whether or not Fred Meyer's combination and inclusion  
21 of extraneous information was willful. It's not something that  
22 should be done on the pleadings, Your Honor.

23 With that, Judge, I think you have our arguments.

24 THE COURT: Okay. Thank you.

25 So let's then move on to the second claim with respect



1 to the pre-adverse action notice, and I'd like to start with the  
2 plaintiff.

3 Can you explain to me your position as to where the  
4 statute allows for the type of relief that you're seeking?

5 MR. WOODROW: Certainly, Judge.

6 The statute requires employers to provide a  
7 pre-adverse action notice, and it delegates to the FTC authority  
8 to show opinions and guidance and to interpret what the statute  
9 means on a limited basis. And while the advisory opinions  
10 aren't binding, they are persuasive, and for nearly 20 years,  
11 Judge, they've held that employers have a burden to provide a  
12 pre-adverse action notice with the purpose being that the  
13 applicant or employee has a reasonable period of time to then  
14 discuss any items in the report with the employer, with the  
15 prospective employer. Otherwise, there's no point to having the  
16 pre-adverse action notice requirement at all. It's just a  
17 perfunctory piece of paper that the employee or applicant is  
18 supposed to get.

19 The FTC has held repeatedly that it's not supposed to  
20 be just some perfunctory piece of paper. It actually serves a  
21 purpose under the statute, to allow employees or applicants not  
22 only to dispute inaccurate information, but to explain  
23 potentially accurate entries that might not tell the full story.  
24 Right?

25 THE COURT: Can I stop -- Counsel, can I stop you

1 right there for just a moment.

2 We have a little bit of -- there's a little bit of  
3 difficulty in hearing you, and I just want to make sure that  
4 everyone is off a speakerphone because I'm hearing a little bit  
5 of an odd crackling sound and I want to make sure the court  
6 reporter can take everything down correctly.

7 So I'm sorry to interrupt you, Mr. Woodrow. Could you  
8 continue, please.

9 MR. WOODROW: Certainly, Judge.

10 Can the court reporter let me know where I left off?

11 THE COURT REPORTER: -- to allow employees or  
12 applicants not only to dispute inaccurate information, but to  
13 explain potentially accurate entries that might not tell the  
14 full story.

15 MR. WOODROW: Right, Judge.

16 So the purpose of the pre-adverse action notice  
17 requirement is to afford applicants and employees this time  
18 period. That's what the FTC has said for 19 years and counting,  
19 Your Honor.

20 It is not express -- expressly in the statute. That's  
21 why the FTC has suggested that employers provide a reasonable  
22 period of time, and the most common period of time cited is five  
23 business days.

24 Here it looks like GIS was trying to follow that  
25 guidance, but it didn't provide people five business days -- it

1 actually sent its final adverse action notice on the fifth  
2 business day -- and it doesn't allow or inform the applicant or  
3 employer that they can discuss these matters with the employer.  
4 It just directs any disputes regarding inaccurate information to  
5 GIS.

6 And also, GIS then informs the applicant or employee  
7 in the final notice that the applicant and employee has been  
8 previously informed of their right to take up any inaccuracies  
9 with courts cited in the consumer report.

10 So what we have here, Judge, is, you know, a basic  
11 failure to follow the FTC guidance. The FTC guidance should be  
12 considered highly persuasive, otherwise the entire purpose of  
13 the pre-adverse action portion of the statute is rendered a  
14 nullity.

15 THE COURT: Okay. I think I understand.

16 Let me ask Mr. Mattingly, any thoughts on that?

17 MR. MATTINGLY: Yes, Your Honor.

18 To the extent FTC guidance is highly persuasive, as  
19 plaintiff's counsel just said, it has been in place for  
20 19 years, there are a -- there are numerous FTC decisions that  
21 say the -- there are two avenues by which a -- someone of -- an  
22 employer can obtain a consumer report and then meet any sort of  
23 burden, assuming there is one, to discuss accurate yet negative  
24 information such as Mr. Walker's accurate yet negative  
25 information in this case. One of those would clearly be to have

1 a direct discussion as suggested by the plaintiff in this case;  
2 however, that is not the only opportunity to do that.

3 The FTC opinions include a discussion or allowing the  
4 consumer to otherwise respond. Fred Meyer has contracted with  
5 GIS to provide adverse action notices, to provide a dispute  
6 process, to send out forms to inform the consumers that they can  
7 dispute or discuss any accurate -- inaccurate information and as  
8 well as adverse action notices.

9 Now, Your Honor, this is important in light of the  
10 congressional intent. I am not aware -- and I don't know -- I'm  
11 not aware of any case from *Spokeo* to the Ninth Circuit to this  
12 very Court that has ever addressed congressional intent  
13 being -- existing so that accurate information can be discussed.

14 In fact, you know, *Spokeo* said that Congress plainly  
15 sought to curb dissemination of false information by adopting  
16 procedures designed to decrease risk. *Syed* said that Congress  
17 recognizes a significant amount of inaccurate information that's  
18 being reported by consumer reporting agencies and the  
19 difficulties that consumers face getting such errors corrected,  
20 and this --

21 THE COURT: Mr. Mattingly, can you just slow down a  
22 tad, please.

23 MR. MATTINGLY: Oh, I'm sorry. I apologize,  
24 Your Honor.

25 And I was going to say and this Court even said

1 Congress intended to ensure that a potential employee would have  
2 the opportunity to address any inaccurately -- or excuse  
3 me -- inaccuracies contained in a consumer report.

4 So if there is a case out there that says the  
5 congressional intent was to allow the consumer to discuss  
6 accurate information, I am unaware of what that is.

7 With respect to that, given that Mr. Walker's  
8 claim -- he doesn't claim that any of the information in the  
9 consumer report was inaccurate, he just claims that Fred Meyer  
10 should have discussed his accurate information with him  
11 directly, we don't think that states a claim.

12 Building on the congressional intent that does exist  
13 in the case law, Your Honor, we believe that a practical -- it's  
14 a practical reality that GIS is exactly who is entitled to  
15 administer the dispute process. Fred Meyer contracts with them.  
16 GIS is the one who -- they compile the report. They have the  
17 ability to double check the report, to make sure it's accurate.

18 So in light of the fact that Congress wanted to  
19 correct inaccurate -- identify inaccurate information and give  
20 consumers the opportunity to rectify that inaccurate  
21 information, Fred Meyer can't do that, GIS can. So asking them  
22 to go through the process is completely in keeping with the  
23 congressional intent, with the case law, and with FTC opinions  
24 that are out there.

25 Now, I would say -- the caveat to that, that is not

1 the same thing as Fred Meyer giving away decisionmaking  
2 authority and to review the findings of GIS, the entity that can  
3 make those changes.

4 THE COURT: So you're saying that notwithstanding this  
5 information or this language in subsection (3)(a) which says  
6 before taking any adverse action that Fred Meyer can delegate  
7 the review of this information or the -- or any corrections or  
8 clarifications regarding this information to GIS, but that  
9 doesn't divest Fred Meyer of the ability to take any adverse  
10 action.

11 I'm not sure if that really made much sense.

12 MR. MATTINGLY: Your Honor, to the -- sorry.

13 THE COURT: Go ahead.

14 MR. MATTINGLY: Well, I was going to say, Your Honor,  
15 to the extent that GIS is hired to administer a process, to  
16 administer the opportunity to otherwise respond, which is  
17 authorized under the law. No final binding decisions are made  
18 until that process has been completed.

19 And, in fact, if we look at the facts on the face of  
20 the complaint, Mr. Walker received a pre-adverse action notice  
21 in, as opposing counsel said, five days, five business days,  
22 generally the recognized waiting period. Mr. Walker did not  
23 avail himself of the opportunity. Even if he thinks he had a  
24 legal right to discuss his accurate information with GIS -- or  
25 with Fred Meyer, he didn't dispute within the reasonable time

1 frame. So there is no injury because he didn't dispute.

2 THE COURT: I understand that argument.

3 So in sum what you're saying is that Fred Meyer has  
4 delegated this particular responsibility to GIS, but it hasn't  
5 delegated its decisionmaking as to whether or not to ultimately  
6 take an adverse action against the employee, so it's not then  
7 violating the terms of the statute or the language of the  
8 statute.

9 Is that somewhat accurate?

10 MR. MATTINGLY: That is absolutely correct,  
11 Your Honor.

12 THE COURT: Okay. So I know it's the defendant's  
13 motion. But let me ask if there's anything else, Mr. Mattingly,  
14 you would like to say with respect to this issue.

15 MR. MATTINGLY: Your Honor, I think the -- our  
16 arguments and the briefs and this discussion today speak for  
17 themselves. So with that, thank you for the opportunity.

18 THE COURT: And then, Mr. Woodrow, Mr. Mattingly made  
19 some arguments that I'd like to give you the opportunity to  
20 respond if you would like.

21 Is there anything you would like to say in response to  
22 what he has just argued?

23 MR. WOODROW: Yes. Thank you, Judge.

24 Steven Woodrow.

25 Fred Meyer seizes upon three words in the FTC guidance

1 where it instructs employers that the purpose of the pre-adverse  
2 action notice requirement is to facilitate a discussion. Fred  
3 Meyer seizes upon the three words "or otherwise respond."

4 Judge, read in context, those three words are not  
5 supposed to be exclusive avenues of each other where an employer  
6 can either discuss issues with the employee one on one or they  
7 can refer to a third party. It's not supposed to be one or the  
8 other. It's supposed to facilitate a discussion between the  
9 applicant and employee with the employer, but does not limit the  
10 applicant or employee from also trying to fix any inaccurate or  
11 misleading information in the consumer report.

12 So we would ask the Court to not read or otherwise  
13 respond in the way that Fred Meyer urges.

14 We also have the fact, Judge, that GIS disclaims any  
15 involvement in the hiring decision process. So complaining to  
16 GIS and lodging disputes with GIS or trying to explain accurate  
17 but misleading information to GIS is -- I hesitate to use the  
18 word "fool's errand," but it does seem a bit of makework on  
19 behalf of applicants and employees. GIS has no ability,  
20 according to its own notices, to make the hiring decision.

21 We also have no facts of record showing that Fred  
22 Meyer only delegates the limited amount of responsibility to  
23 GIS. What it seems happens is that Fred Meyer provides a list  
24 of system criteria to GIS and then GIS produces notices based on  
25 that system criteria and that there's actually very little, if



1 any, communication between GIS and Fred Meyer once those  
2 criteria are met.

3 So if an application like Daniel Walker's comes back  
4 with a flag on it, it's our belief that Fred Meyer has very  
5 limited involvement after that point. It's basically instructed  
6 GIS what to do when these types of flags are raised and  
7 therefore we don't need to be involved in the process anymore.

8 So while Counsel might ultimately be correct and our  
9 hunches might be wrong, Judge, we don't have any facts of record  
10 to show that now. We need discovery on that issue.

11 It does look like Fred Meyer shoves this off onto GIS  
12 and directs any disputes to GIS, but then, you know, in a game  
13 of sort of cat and mouse, then when the decision comes down  
14 says, oh, GIS had nothing to do with it.

15 So, Judge, we would urge the Court to look past that.

16 THE COURT: Can you clarify, Counsel, the language of  
17 the statute as you know says before taking any adverse action  
18 based in whole or in part on the report, the person intending to  
19 take such adverse action shall provide to the consumer a copy of  
20 the report.

21 Can you tell me where in the statute or how it is that  
22 you arrive at the conclusion that this statute provides people  
23 such as your client the right to discuss the adverse action with  
24 the employer.

25 MR. WOODROW: Yes, Judge.

1           That's set forth most fully and completely in our  
2 briefing. We cite -- I believe it's two or three FTC decisions  
3 repeating over and over again that employers should get with  
4 their lawyers and craft reasonable language in light of the  
5 purpose of the statute and of the standalone notice requirement.

6           And they say that over and over again, that the  
7 purpose of the requirement -- I'll quote it for you,  
8 Your Honor -- it's in the *Lewis* advisory opinion and others.  
9 "Employers may wish to consult with their counsel in order to  
10 develop procedures that are appropriate keeping in mind the  
11 purpose of the provisions to allow" --

12           THE COURT: Sorry, Counsel. When you're reading, be  
13 sure to slow down.

14           MR. WOODROW: Certainly, Judge.

15           This is in advisory opinion to *Coffey*, and in advisory  
16 opinion to *Lewis*, and what they say is, "Employers may wish to  
17 consult with their counsel in order to develop procedures that  
18 are appropriate keeping in mind the purpose of the provision is  
19 to allow consumers to discuss the report with employers before  
20 adverse action is taken."

21           And that's back from 1998, Your Honor, in June. So  
22 we're coming up on its 20th anniversary.

23           And the reason I believe, Judge, that these issues  
24 rarely come up is because most employers do a good job of  
25 following the FTC guidance and don't force employees and

1 applicants to go to some third party that later disclaims any  
2 responsibility in the hiring decision.

3 THE COURT: Okay. I think I understand.

4 Let me just finally go to Mr. Mattingly just to give  
5 you an opportunity to address that last issue if you would like.

6 MR. MATTINGLY: Yes, Your Honor.

7 Again, I would point out that there are multiple FTC  
8 opinions, there are opinions that say -- discussions such as the  
9 one Mr. Woodrow just mentioned that state what he stated, what  
10 he read.

11 As I've already stated, there are also other FTC  
12 opinions that include a statement or otherwise respond clearly  
13 since it's an "or," not an "and," it's not one or the other.

14 And I'm trying to -- let me look at my notes real  
15 quick, Your Honor.

16 The only other thing that I want to bring up without  
17 bringing up a whole other issue is, again, I would just point  
18 out that the -- to the extent that these opinions have been out  
19 there for 19 years, they are not authoritative. Some courts,  
20 not the Ninth Circuit, have found them to be persuasive. The  
21 Ninth Circuit in *Syed* did not find them to be persuasive even  
22 when they were dealing with an issue where the FTC opinions were  
23 relevant to the issue at hand. In that case it was a liability  
24 waiver case, whether liability waiver was extraneous  
25 information. There are FTC opinions directly on that issue and

1 the Ninth Circuit specifically declined to rely on those.

2 So to the extent that this entire case of Mr. Walker's  
3 is built on FTC opinions, the statute doesn't contain any of  
4 this, and so we're left with the Ninth Circuit saying that FTC  
5 opinions are -- essentially they're going to decline to rely on  
6 them.

7 So I would just point that out and -- with respect to  
8 the value of the FTC opinions.

9 THE COURT: Okay. All right. So let me thank you all  
10 for your helpful arguments today and also for the excellent  
11 briefing. I'm going to take it under advisement as of today.  
12 I'll take a closer look, of course, at your briefing and also  
13 the cases that you've cited.

14 So with that, I think that we're going to conclude our  
15 proceedings for today.

16 Thanks so much.

17

18 (The proceedings concluded at 10:12 a.m.)

19

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## C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-titled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

DATED this 27th day of August, 2018.

\_\_\_\_\_  
RYAN WHITE  
Registered Merit Reporter  
Certified Realtime Reporter  
Expires 9/30/2019  
Washington CCR No. 3220  
Expires 10/25/2018  
Oregon CSR No. 10-0419  
Expires 12/31/2020

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